

applications and notices. Issuance of subordinated debt and mandatorily redeemable preferred stock applications and notices shall be subject to the following conditions:

(1) Where securities are to be sold pursuant to an offering circular required to be filed with the OTS pursuant to 12 CFR 563g.2, and where such offering circular has not yet been declared effective prior to the date of approval of or nonobjection to the subordinated debt or preferred stock application or notice, the offering circular in the form declared effective shall not disclose any material adverse information concerning the savings association's business, operations, prospects, or financial condition not disclosed in the latest form of offering circular filed as an exhibit to the application or notice;

(2) The savings association shall submit to the OTS no later than 30 days from the completion of the sale of the securities, certification of compliance with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities;

(3) The savings association shall submit to the OTS no later than 30 days from the completion of the sale of the securities, the report(s) required by paragraph (h) of this section and the following additional items:

(i) Three copies of an executed form of the securities issued pursuant to the subject application or notice and a copy of any related agreement or indenture governing the issuance of securities; and

(ii) A certificate from the principal executive officer of the savings association that states that to the best of his or her knowledge, none of the securities issued pursuant to the subject application or notice were sold to any association whose accounts are insured by the Savings Association Insurance Fund, or a corporate affiliate thereof, except as permitted by 12 CFR 563.81;

(4) That as of the date of approval or nonobjection, there have been no material changes with respect to the information disclosed in the application or notice as submitted to the OTS;

(5) The savings association receives prior written approval or nonobjection from the OTS for any post-approval

amendment to the securities or any related indenture if:

(i) The proposed amendment modifies or is inconsistent with any provision of the securities, or the indenture that is required to be included therein by the OTS's regulations as may then be in effect or would result in a transfer of risk to the savings association or the Savings Association Insurance Fund or the Bank Insurance Fund, as appropriate; and

(ii) All or a portion of the proceeds from the issuance and sale of the securities would continue to be included in the regulatory capital of the savings association following adoption of the amendment;

(6) The savings association shall submit to the OTS promptly after execution, one copy of each amendment to the securities or the related indenture, made after approval or nonobjection, and if prior approval of or nonobjection to such amendment was not obtained, shall also state the reason(s) such prior approval or nonobjection was not required; and

(7) Before any offers or sales of the securities are made on the premises of the association or its affiliates, the savings association shall submit to the OTS a set of policies and procedures for such sale of the securities satisfactory to the OTS.

[54 FR 49552, Nov. 30, 1989, as amended at 55 FR 13515, Apr. 11, 1990; 57 FR 14345, Apr. 20, 1992; 62 FR 66262, Dec. 18, 1997]

§ 563.84 Transfer and repurchase of government securities.

(a) A savings association shall not issue repurchase agreement obligations in denominations under \$100,000 with a maturity of 90 days or more evidencing an indebtedness arising from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States or any agency thereof that the savings association is obligated to repurchase, unless such obligations are issued to financial institutions the accounts or deposits of which are insured by the Federal Deposit Insurance Corporation or to a broker or dealer registered with the Securities and Exchange Commission.

(b) Any repurchase agreement obligation under \$100,000 with a maturity of less than 90 days shall meet the following requirements.

(1) *Legend.* Each repurchase agreement and all advertisements and offering documents relating to repurchase agreements shall state, on their face, in plainly legible form, the following legend:

This obligation is not a savings account or a deposit and is not insured by the Federal Deposit Insurance Corporation.

(2) *Prohibited representations.* A savings association issuing repurchase agreements shall not use in its agreements, advertisements, or offering documents the terms “guaranteed,” “no risk,” “account,” “deposit,” “withdraw” or other terms which imply that the repurchase agreement is insured or guaranteed by the United States government, an agency of the United States government, or any third party; or the term “fund” or other terms which imply that the repurchase agreement is an interest in an investment company.

(3) *Security interest.* The interest of a repurchase agreement purchaser in the security or securities underlying the repurchase agreement shall constitute a perfected security interest under applicable state law.

(4) *Value of collateral.* The market value of the security or securities underlying a repurchase agreement shall be at least equal to the principal amount of the issuing savings association’s repurchase agreement obligation as of a date certain in each succeeding month of the original or renewed term of the repurchase agreement.

(5) *Disclosure.* A savings association issuing repurchase agreements to the public shall provide each prospective repurchase agreement purchaser with an offering document which shall contain full and accurate disclosure of all material information regarding the repurchase agreement and the issuing savings association. Any material change in any of the material representations set forth in the offering document shall be reflected in a revised offering document that shall be provided to purchasers before any renewal or automatic renewal of a repurchase agreement may be effected. A savings

association that has a regulatory capital deficiency under paragraph (b)(7) of this section shall be subject to the requirements of part 563g of this chapter, except that the following financial statements may be substituted for those required to be included in an offering circular required under part 563g of this chapter:

(i) The savings association’s audited statements of condition and operations for its last fiscal year prepared in accordance with the requirements of §563c.1 of this chapter;

(ii) On a comparative basis, the savings association’s latest unaudited statement of condition for the quarter ending within 135 days of any sale, renewal, or automatic renewal of a repurchase agreement, and an unaudited statement of operations for the period then ended, prepared in accordance with the requirements of §563c.1 of this chapter; and

(iii) The savings association’s latest monthly financial report filed with the Office.

(6) *Renewal; notice of applicable interest rates.* The maximum term of a repurchase agreement shall be 89 days. Unless otherwise provided for by the terms of a repurchase agreement, automatic renewals effected within an 89-day period from the date of execution, renewal, or automatic renewal of a repurchase agreement shall not be deemed to constitute renewals or automatic renewals under paragraph (b) of this section. Repurchase agreements may be automatically renewed for any period not exceeding 89 days for each automatic renewal pursuant only to the written agreement between the purchaser and the issuing savings association that the repurchase agreement may be automatically renewed at the option of the issuing savings association in the absence of the oral or written instruction of the purchaser that the repurchase agreement shall not be renewed. Savings associations which provide for the automatic renewal of repurchase agreements shall provide and notify each retail repurchase agreement purchaser of a means to determine the current rates of interest. Repurchase agreements may not be

automatically renewed by a savings association which has a regulatory capital deficiency under paragraph (b)(7) of this section.

(7) *Eligibility requirements.* A savings association that issues or has outstanding repurchase agreements issued pursuant to paragraph (b) of this section shall calculate its total capital on a monthly basis in accordance with part 567 of this chapter. A savings association that does not have total capital equal to the sum of one percent of all liabilities of the savings association, plus an amount equal to 20 percent of the savings association's assets classified under § 563.160 of this part, shall not issue or renew repurchase agreements under paragraph (b) of this section unless it meets the following additional requirements:

(i) Within 45 days after the determination of a regulatory capital deficiency under paragraph (b)(7) of this section, the savings association shall file with the OTS pursuant to § 516.1 of this chapter and shall continue to file thereafter on a current basis for as long as the regulatory capital deficiency shall exist, the following:

(A) Three copies of an opinion of independent legal counsel that the interest of repurchase agreement purchasers in the security or securities underlying the repurchase agreements constitutes a perfected security interest under applicable state law; and

(B) The offering document required under paragraph (b)(5) of this section.

(ii) Within 45 days after the determination of a regulatory capital deficiency under paragraph (b)(7) of this section, and thereafter on a date certain in each succeeding week of the original or renewed term of the repurchase agreement for as long as the regulatory capital deficiency shall exist, the market value of the savings association's security or securities underlying a repurchase agreement shall be at least equal to 105 percent of the principal amount of the issuing savings association's repurchase agreement obligation, plus accrued interest.

(iii) A savings association which has a regulatory capital deficiency under paragraph (b)(7) of this section shall not renew an outstanding repurchase agreement unless it provides the pur-

chaser with the disclosure document required under paragraph (b)(5) of this section and the purchaser thereafter affirmatively elects to renew the repurchase agreement.

[54 FR 49552, Nov. 30, 1989, as amended at 57 FR 33438, July 29, 1992; 59 FR 66159, Dec. 23, 1994]

Subpart D [Reserved]

Subpart E—Limits Tied to Capital Levels

§ 563.133 [Reserved]

§ 563.134 Capital distributions.

(a) *Definitions*—(1) *Capital distribution* means:

(i) Any dividend paid or other distribution in cash or in kind (valued and accounted for in accordance with generally accepted accounting principles) made on or with respect to any shares of an association, but not including a dividend consisting of shares of the association;

(ii) Any payment made by an association to repurchase, redeem, retire or otherwise acquire any of its shares;

(iii) Other distributions charged against the capital accounts of an association;

(iv) Any payments to shareholders of an association by an acquiring association to acquire ownership of the association, other than distributions of shares of the acquiring association; and

(v) Other types of transactions determined by the Office to entail the payout of capital by an association.

(2) *Capital* means total capital as defined under § 567.5(c) of this chapter.

(3) *Capital requirement* means an association's capital requirement under part 567 of this chapter.

(4) *Minimum capital requirement* means an association's tangible capital, leverage ratio and risk-based capital requirements as required by § 567.2 of this chapter, as modified to reflect any individual minimum capital requirement applicable to the association.

(5) *Net income* means an association's net income computed in accordance with generally accepted accounting principles.